No. 455

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

THE NEW YORK LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

JANE E. DINGLEY as Administrator of the Estate of WALTER FREDERICK DINGLEY, Deceased,

Defendant in Error.

Petition for Rehearing

GEORGE H. DURHAM,

Attorney for Plaintiff in Error.

GOODFELLOW, MCCUTCHEN & BELLS,

Of Counsel.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

FRANK E. DINGLEY as Administrator of the Estate of Walter Frederick Dingley, Deceased,
Defendant in Error.

Petition for Rehearing.

This action came before this Court on writ of error to the Circuit Court for the Northern District of Washington. It was an action on a policy of life insurance, and the defense interposed was the forfeiture of the policy for non-payment of a premium. To this defense, the defendant in error, plaintiff in the court

below, replied that no sufficient notice had ever been sent by the company as required by the laws of New York, subject to which the contract had been made. It appeared that a certain notice had been sent, but it was contended that the notice either was sent at the wrong time, or was insufficient in form, or was defective in both respects. The decision in the Court below was adverse to the insurance company, and this Court has rendered an opinion upholding this decision. Plaintiff in error, however, now respectfully asks that a rehearing of this case be granted.

It is respectfully submitted that this Court has rested its decision on grounds which are now for the first time suggested, and which counsel for plaintiff in error should have an opportunity to discuss before the final decision of the case. The main question argued before the Court was the question as to the "due" date of the premium, and the proper time for the sending of the notice. It was strenuously contended on behalf of defendant in error that the 19th of August was the day on which the premium fell due, and that, therefore, the notice was mailed too long in advance. On this point the Court has held decisively with plaintiff in error, saying that "it cannot be doubted that, under the "terms of the policy in suit, the premium for the year "1896 became payable *on the 19th day of July* of that "year. * * It (the notice) was given June 27, 1896, "*and was therefore within the prescribed time.*" The other ground discussed on the argument was that on

which the Court below rested its decision. That Court said that the notice "if it had stopped with the "signature of the president would have been probably "a legal notice and full compliance with the statute" (Trans. p. 94); but, that by stating in addition that under certain circumstances such forfeiture would not take place, it had the effect of lulling the policy holder into a feeling of security, and that it therefore fell short of being the peremptory warning called for by the statute. It was to meet this contention that the argument of plaintiff in error was addressed, and apparently with too great success, for this Court has held the notice insufficient, not because it fails to give sufficiently peremptory warning, but because the warning is too peremptory, and the effect of it is to lead the policy holder to believe the policy absolutely lost through a failure to pay on the day named. We quote from the opinion:

"These contradictory and inconsistent notices do "not answer the requirement of the New York statute "as construed by the Court of Appeals of that State, "which demands a notice to the insured in plain, and "therefore unambiguous, terms of the time when the "premium will be due, *and of the time when a forfeit-"ure will accrue if not theretofore paid.* The insured "in the present instance, receiving the notice sent him "by the Company, and from lack of ability or neglect "not having paid the premium on the 19th day of "July 1896, *might very readily have supposed that his "failure to pay on that day worked a forfeiture of the*

" *policy ;* for in the first part of the notice he was dis-
" tinctly so told, although wrongly, as has been shown.
" Receiving such notice from the Company, and the
" 19th day of July, 1896, having come and gone with-
" out the payment of the premium, *it might very well*
" *have happened that the insured relied upon the*
" *information thus conveyed, and abandoned all effort to*
" *pay the premium without looking to the Statute of*
" *New York, or to the grace clause printed on the back*
" *of the notice.*" It seems to us that the notice cannot at one and the same time be open to the objection that it leads the policy holder to believe the forfeiture absolute, and to the objection that it leads him to believe that no forfeiture at all will be declared.

We ask respectfully that a rehearing of this cause may be granted and the plaintiff in error may be heard on this point before the final decision of the case; and in support of that request shall give a brief outline of the reasons which lead us to believe that the notice is not open to the objections now urged.

(1) In the first place the terms of the statute are peremptory in this regard and leave the insurance company no choice as to certain things that the notice must contain. The language of the statute does not seem to us to require construction by the court. Before a court can be called on to say what a statute means, there must be some uncertainty on its face. In this

case there is none. It would be difficult to select more clear and explicit language than that employed in this statute. It provides that the notice "*shall* also state "that unless such premium * * shall be paid to "the corporation * * by or before the day it falls "due, the policy and all payments thereon will become "forfeited and void". It is useless to speculate as to what the legislature meant by so providing. If the language were ambiguous the intent of the legislature might be an important factor in determining which of two possible constructions should be placed upon it. Where the language means but one thing, however, it must be accepted as it stands. Neither can it be said that the fact that by the terms of the policy in question a month's grace was allowed the insured, makes the provision inapplicable. Under the very provisions of the statute itself the statement that the policy will be forfeited if the premium is not paid on the day it is due, if taken literally, may be an inaccurate statement. The law itself is not ambiguous, but the notice given under it would be. For though the statute provides that the notice is good even if mailed only fifteen days before the due date, it also forbids forfeiture until thirty days after the mailing of the notice. The very statute itself then contemplates that under some circumstances the statement in the notice as to forfeiture, if taken strictly, will not be true; but, however the statement is to be taken, it must, nevertheless, by the peremptory provisions of the stat-

ute, be made. If the legislature did not choose to except the very case where, by the terms of the statute, the statement must be an inexact one, why should it be argued or assumed that there is an implied exception in the case of a contract which grants a greater indulgence to the insured than that required by the statute itself?

These considerations seem to have been present in the mind of the learned trial Judge, and to have governed him in reaching his conclusion. He held in fact that not only must the notice contain the statement that the policy is to be forfeited on the day named, but that it must contain that statement alone; and that if the notice goes on to state the terms which the insured may avail himself of to prevent such a forfeiture, this additional statement qualifies the effect of the statement required by the statute and invalidates the whole notice. From expressions used in the early part of its opinion it would seem that this Court, too, inclined to the same conclusion. The opinion expressly declares in fact that the main part of the notice, which it will be observed follows the statute word for word, "was a sub-"stantial compliance with the requirements of the "statute". From the rest of the opinion, however, it seems clear that the objection which the Court makes to the notice is not the objection of the Court below, that it contains additional matter and does not stop with the declaration as to forfeiture, but the objection that the qualification contained in this very additional

matter is not sufficiently explicit to advise the insured of his real rights. On the argument we were called upon to justify the addition of the statements on the reverse of the card; now the position taken by the Court requires of us a justification also of the matter on the face of the card, and that, too, although in the opinion itself it is admitted that the matter there given is "a " substantial compliance with the requirements of the " statute".

The reasoning of the Court seems to proceed on the theory that the statute as construed by the New York Courts "demands a notice to the insured in " plain and therefore unambiguous terms of the time " when the premium will be due, *and of the time when* " *a forfeiture will accrue if not theretofore paid*". (We quote from the opinion of the Court, but the italics are our own.) If by the italicised clause is meant that the statute *requires* notice of the time when a forfeiture will actually be enforced, we submit that the statute makes no such provision, nor do the decisions of the New York Court of Appeals raise any such implication from the language used. The statute requires in plain terms that the notice shall specify the day when the premium is due, and shall state that if the premium is not then paid the policy will be forfeited. There is but one time mentioned in the statute and that is the time when the premium is due. That is the time which it is expressly provided by the statute must be the time limited in the notice for the

payment of the premium to prevent forfeiture. With the question whether the policy will or will not actually be forfeited at that time, the notice as prescribed by the statute has nothing to do. And with the question why the legislature should have provided that a notice should contain a certain statement, and in the same breath should have taken away from the company the power to effect that statement, a court can have no concern. The legislature has done so and its action is conclusive. But it seems to us not unreasonable to suppose that the provision was deliberate, that the legislature intended a direct statement in the nature of a warning to the policy holder, to make him realize the serious consequences of a failure to pay the premium. If indulgence were to be granted by the company, either voluntarily or under compulsion of the statute, that would be another matter. The thing to do was in the first place to warn him that his failure to pay might mean the loss of his policy. Nor is the fact that the statement required might not be literally true, a controlling consideration. Strict stipulations as to forfeiture as a matter of every day experience are not to be taken literally, but are understood as subject to the control of the law and the indulgence of the parties. Whatever the intention of the legislature may have been, however, its expressed will is clear enough, and, we submit, requires a statement to the insured that his policy will be forfeited if the premium is not paid when it is due, and does not require a statement of the time

during which the premium will still be accepted or of the time when a forfeiture under the law and the contract will actually accrue.

(2.) It is quite a different proposition, however, that the statute should be held to have forbidden the company to qualify the required statement, explain it in so far as it was, strictly speaking, inaccurate, and remind the insured of the steps to be taken to avoid this forfeiture. We contended on the argument that the legislature could not have intended to compel the insurance company to make a possibly misleading statement, and at the same time to compel it to leave this statement unexplained. And we believe now that while the matter on the face of the card is required by the statute and is all that is absolutely *required*, still it is unreasonable to suppose that the notice would be invalidated, as was held by the Court below, by the matter on the reverse side which qualifies and explains the statement on the face. To supply that matter in the notice, we believe, is to comply with the spirit of the statute even if is not required by the letter. And even if the statute is to receive the construction placed upon it by this Court, making this qualification compulsory, it is submitted that this notice, in addition to complying with the express statutory provision, does also contain " a " plain and therefore unambiguous " notice " of the " time when the premiums will be due and of the time

" when a forfeiture will accrue if not theretofore paid ".

It is to be noted at the outset that as far as the contract between the parties is concerned and except for the provisions of the statute, the only time when the payment of the premium *alone* would prevent a forfeiture is the time before or on the day on which it first falls due. It will not be accepted after that time, *except with five per cent interest*, nor will the payment of any less sum than the premium, *together with that interest*, suffice to prevent the forfeiture after the day on which the premium is due. So that it is literally true that by the terms of the contract the last day on which the premium by itself may be paid to prevent a forfeiture is the 19th day of July.

But more than that, the notice given in this case provides on its face that it "is required by the law of New " York, and does not modify any of the terms of the " contract." Thus the attention of the insured is specifically directed to the fact that the notice is given because required by statute and that he has certain rights under the contract which are not in any way affected thereby. It cannot be presumed that he is altogether ignorant of what those rights are, but through excess of precaution they are further explicitly set out in the notice itself. Nor, it is submitted, do these statements of the notice present any actual ambiguity to the average mind. If the statement is made to a policy-holder that his premium is due on a cer-

tain day, that if he fails to pay it at that time his policy is liable to forfeiture, but that by the payment of the same *with interest* within a month thereafter this forfeiture may be avoided, it seem to us that no layman could fail to understand its meaning. It is submitted, too, that such a notice serves every purpose which could conceivably have been the inducing motive of the legislature in enacting the statute in question. It conveys to the policy holder a reminder of the day when his premium falls due; it advises him of the serious consequences that are involved in a failure to make the payment, and it reminds him, too, of the way in which he may avoid such consequences, even if he is unable to make payment of the premium on the day. It is submitted that no one could ever really be deceived by such a notice.

(3). There is one further consideration which we wish to urge upon the Court, and that is the fact that the Court's decision turns a statute which was very obviously intended for the benefit of the policy holder into a source of injury to him. The statute provides that the notice must state that the policy will be forfeited if the premium is not paid when it is due. If this means that the statement when made must be rigorously true or that otherwise it will mislead the insured, and that it cannot be qualified without making the notice ambiguous, then it means that the company

is forbidden to bind itself by contract to grant any indulgence at all to the insured in the matter of the payment. The notice will be mailed thirty days before the due date, and an absolute forfeiture declared without mercy on the day after the premium falls due.

It is submitted that the Court is imposing a hard penalty on the company for making a conscientious effort to abide by the statute on the one hand and yet on the other to give its policy holder the benefit of every indulgence which it could consistently grant. In giving the notice it has followed literally the words of the statute, but not wishing to mislead its policy holders into thinking that their rights were any less than they were, it made the explanation that the notice was given because required by the statute and that it did not affect the contract rights of the policy holder, following this with a re-statement of what those rights were. To hold now that the statute has not been complied with for the reason that this notice of the contract rights of the policy holder does not control the other statements with sufficient clearness, it is submitted, is to disregard the plain purport of the notice; but more than that it is to make a substantial addition to a clear expression of the legislative will; to disregard the plain language in which that will is expressed, to make, in short, a new enactment. It is to say that the legislature did not require what it has in unequivocal terms demanded, but that it did require something which it has not mentioned. And it is finally to make detrimental to

the policy holders an act which was admittedly intended for their benefit.

It is respectfully submitted that a rehearing of this case should be granted.

GEO. H. DURHAM,
Attorney for Plaintiff in Error.

PAGE, McCUTCHEN & EELLS,
of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded, and I further certify that it is not interposed for delay.

Dated March 7th, 1899.

CHARLES P. EELLS,
of Counsel for Plaintiff in Error.